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No. 10-1027

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MISSOURI TITLE LOANS, INC.,
Petitioner,

v.

BEVERLY BREWER,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

Instead of responding to Missouri Title's petition, Brewer's brief in opposition argues the merits of her case and throws out assorted red herrings. For example, she claims that the petition insults the Supreme Court of Missouri. Br. at 1-3. Any petition for certiorari – any appeal, for that matter – will necessarily argue that the lower court got it wrong. There is nothing insulting about seeking certiorari.

Similarly, Brewer argues that Missouri Title is asking this Court to review pure questions of state law. Br. at 3-4. The Federal Arbitration Act (FAA) applies to proceedings in state court. *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984). The first

question this petition asks is whether the FAA preempts state law that requires consent to class arbitration as a condition of ordering arbitration. The second question is whether Missouri courts are using generally applicable principles of state law in the enforcement of arbitration clauses, as required by the FAA.

Both of these are federal questions, as this Court has repeatedly recognized. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (reversing Alabama Supreme Court and holding that FAA preempted state statute invalidating pre-dispute arbitration agreements); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (reversing Montana Supreme Court and holding that FAA preempted state statute imposing special typographical requirements on arbitration provisions that were not required for other types of contractual provisions); *Southland Corp.*, 465 U.S. at 15 (reversing California Supreme Court and holding that FAA preempts state statute requiring judicial consideration of franchise claims).

Finally, Brewer repeatedly argues that the petition does not challenge the "second holding" of the court below. Br. at 5; 7; 26. Before the Supreme Court of Missouri, Missouri Title argued, in the alternative, that the arbitration clause was enforceable as a valid exculpatory clause, a proposition that Court rejected. That is quite irrelevant to Missouri Title's argument here that the federal policy in favor of arbitration trumps Missouri's preference for class actions and that Missouri courts do not fairly enforce arbitration clauses, at least in the employee/consumer context. If Missouri Title prevails on either question, Brewer

must arbitrate her individual case regardless of whether the clause is exculpatory.

I. THIS CASE PRESENTS THE SAME FAA PREEMPTION QUESTION THAT IS PRESENTLY UNDER ADVISEMENT IN *AT&T MOBILITY LLC V. CONCEPCION.*

Brewer does not dispute that the first question presented is substantially similar to the question presented in *AT&T Mobility LLC v. Concepcion*, No. 09-983, argued before this Court on November 9, 2010. Instead, she argues that this is a "compelling reason for denying the Petition," because *Conception* will resolve the issue.

This argument is completely illogical. However *Conception* comes out, its holding is likely to affect this case. Given the substantial similarity of the questions presented, this Court should at minimum hold the petition pending its decision in *Concepcion*. It should then grant the petition, vacate the judgment and remand for further consideration in light of *Concepcion*. *See, e.g.*, *American Express Co. v. Italian Colors Restaurant*, __ U.S. __, 130 S. Ct. 2401 (2010) (granting the petition and remanding for reconsideration in light of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, __ U.S. __, 130 S. Ct. 1758 (2010)); *Hughes Elec. Corp. v. Garcia*, 540 U.S. 801 (2003) (granting the petition and remanding for reconsideration in light of *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003)).

Given the breadth of the holding below, that disposition would be appropriate even if this Court affirms *Concepcion*. Most consumer fraud cases involve a relatively small sum of money, less than the $4,000 at issue here. The Supreme Court of Missouri has

effectively invalidated arbitration in all of these cases, based on the empirically false assumption that statutory attorneys' fee provisions are insufficient to attract lawyers to individual, low-dollar cases.

II. THE SUPREME COURT OF MISSOURI'S RULING CONFLICTS WITH THE FAA, DECISIONS OF THIS COURT AND THE VAST MAJORITY OF FEDERAL AND STATE APPELLATE COURT OPINIONS ON THE VALIDITY OF CLASS ACTION WAIVERS IN ARBITRATION AGREEMENTS.

The petition established that the decision below is contrary to the great majority of federal opinions, and a significant number of state opinions, addressing the enforceability of arbitration clauses in consumer fraud cases. Brewer does not even try to respond.

Instead, she resorts to rhetoric: "[w]hat should a court do" when the failure to allow class arbitration allegedly makes a contract unconscionable? Br. at 21-22. The only answer that comports with the FAA is to compel respondent to arbitrate her claims on an individual basis. Regardless of the class issues, there is still an agreement to arbitrate – an agreement by the parties to resolve disputes *outside the court system* – that remains "valid, irrevocable, and enforceable" under the FAA. 9 U.S.C. § 2. The decision of the Supreme Court of Missouri to order class litigation in court because class arbitration was not possible is analogous to the "industrial justice" dispensed by the arbitrators in *Stolt-Nielsen*, __ U.S. at __, 130 S. Ct. at 1767, and is no less repugnant to the FAA:

> While the interpretation of an arbitration agreement is generally a matter of state law . . . , the FAA imposes certain rules of fundamental importance . . . .
>
> . . . . [T]he central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms.
>
> . . . . Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts . . . must give effect to the contractual rights and expectations of the parties.

Stolt-Nielsen, __ U.S. at __, 130 S. Ct. at 1773 (internal punctuation omitted).

Brewer rhetorically bemoans the fate of the "thousands of similarly situated victims" of Missouri Title's allegedly improper practices. Br. at 22. If any of these people genuinely believe that Missouri Title has violated their legal rights, they too can arbitrate their individual cases. Only three people have so far chosen to complain. That strongly suggests that this case, like most consumer class actions, is generating litigation that would not otherwise exist, because most consumers are satisfied with their vendors. *Elster v. Alexander*, 76 F.R.D. 440, 443 (N.D. Ga. 1977) ("[t]his Court is unwilling to breathe the spirit of judicial combat into 8,500 persons who, so far, have shown no desire to litigate this matter").

Brewer claims that the "undisputed evidence" is that Missouri Title customers would have "an extraordinarily difficult time" obtaining counsel for individual cases. Br. at 22. That "undisputed evidence" consists of the self-serving speculation of three plaintiffs' lawyers. That kind of speculation does not warrant a finding of unconscionability. *Green Tree*

Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000). As held in *Strand v. U.S. Bank N.A.*, 693 N.W.2d 918 (N.D. 2005):

> Strand points to no empirical evidence that **all** attorneys would be unwilling to litigate these claims. Strand's attorney filed an affidavit stating that *he* would not accept individual cases involving the amounts at issue here. That is not, however, evidence that *no* attorney would be willing to accept such cases, particularly where attorney fees are available for prevailing plaintiffs.

693 N.W.2d at 926 (bold and underline added; italics original).

The petition presented substantial empirical evidence that lawyers will take low-dollar consumer cases when there are statutory attorneys' fees provisions. Unable to respond to that evidence, Brewer asserts that it is "made up out of thin air." Br. at 24. The numerous cases in which Missouri lawyers did take such cases, including several by Brewer's alleged expert, are not "made up out of thin air." The 1999 Fair Debt Collection Practices Act cases filed by private counsel in the United States District Court for the Eastern District of Missouri in less than six months are not "made up out of thin air." The numerous state and federal opinions squarely holding that statutory attorneys' fees are sufficient to attract competent counsel are not "made up out of thin air."

Brewer complains that Missouri Title has not attached the actual language of the arbitration clause, because it is of a kind "used like big sticks to beat customers." Br. at 24-25. The precise terms of that clause are quite irrelevant to this petition, given

the breadth of the holding below. To repeat, that holding is that, absent consent to a class action, Missouri courts will not enforce arbitration clauses in cases involving damages of $4,000 or less. That effectively prohibits arbitration in most consumer cases.

III. MISSOURI COURTS CONTRAVENE THE FAA BY DISCRIMINATING AGAINST ARBITRATION PROVISIONS IN PRACTICE.

The petition established that, whatever lip service Missouri courts pay to arbitration, in practice they treat those agreements much more harshly than others. Continued at-will employment is sufficient consideration for every other kind of contract – but not arbitration. Contractual provisions that make a case less attractive to a lawyer are perfectly acceptable in other contexts – but not arbitration. A defense to every other contract requires both procedural and substantive unconscionability – but not arbitration.

Brewer attempts to respond only to the unconscionability issue. She argues that there are procedural and substantive "aspects" of unconscionability; that the two often go hand in hand; and that the majority opinion found procedural unconscionability. Br. at 18-20.

These arguments miss the point. The majority opinion squarely held that "there are cases in which a contract provision is sufficiently unfair to warrant a finding of unconscionability on substantive grounds alone." App. 6a. The only cases so holding, however, involve arbitration clauses. As the dissent states, the general rule in Missouri is that "a contract will not be voided for unconscionability unless it is both procedurally and substantively unconscionable." App. 14a.

This is clear evidence that Missouri courts do not, in practice, apply the same rules to arbitration clauses that they apply to other kinds of contracts. That discrimination violates the FAA.

CONCLUSION

For these reasons, petitioner Missouri Title Loans, Inc. respectfully prays that the Court grant its petition for a writ of certiorari.

Respectfully submitted,

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